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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 364

KEIFER AND KEIFER, a co-partnership, composed of J. Warren Keifer, Jr., and Oswin Keifer,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation, and REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, a corporation,

Respondents

BRIEF OF PETITIONER

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No. 364

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Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation, and REGIONAL AGRICULTURAL CREDIT CORPORATION OF SIOUX CITY, IOWA, a corporation,

Respondents

BRIEF OF PETITIONER

To the Honorable, The Supreme Court of the United States:

A writ of certiorari was granted for review of the decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decree of the United States District Court for the District of Nebraska, Omaha Division. The District Court opinion (R. 35) is reported as *Keifer & Keifer* v. *R. F. C. and Regional Agricultural Credit Corp.*, 22 Fed. Sup. 918. The United States Circuit Court of Appeals opinion (R. 45-51) is reported as *Keifer & Keifer* v. *Reconstruction Finance Corp., et al*, 97 Fed. (2d) 812.

The sole question to be presented to this court under the ruling of this court on the petition for writ of certiorari is whether the "Regional", a corporation created by the "RFC" pursuant to an act of Congress with its capital of $3,000,000.00 subscribed and paid by the "RFC", whose officers and agents were appointed by the "RFC" until this function was transferred to the Farm Credit Administration by executive order No. 6084, dated March 27, 1933, and which "Regional" is authorized by said congressional act, 15 U. S. C. A. 605B (e) to have capital (not capital stock), corporate organization, and power to make loans and advances for agricultural and livestock purposes, charge interest thereon, and to rediscount its paper and which Act of Congress did not, in express terms, declare that the "Regional" might sue or be sued and which "Regional" was engaged at the time of the tortious act complained of in wintering livestock upon which the "Regional" had a chattel mortgage, upon a ranch operated by it, is subject to suit for a tort committed by it.

STATEMENT OF THE CASE

This is an action at law brought in the District Court of the United States for the District of Nebraska, Omaha Division, by the petitioner herein against the respondents. The petition sets forth in separate counts five causes of action. Of these five causes of action, four are brought by the petitioner as assignee while the other is brought by the petitioner in its own right. For the sake of brevity the petitioner and the petitioner's four assignors will be referred to herein as "petitioner" and the Reconstruction Finance Corporation, a corporation, will be designated and referred to herein as "RFC" and the Regional Agricultural Credit

Corporation of Sioux City, Iowa, will be designated and referred to herein as the "Regional".

In all of the five causes of action it is alleged that "petitioner" delivered to the "Regional" certain cattle which the "Regional", as mortgagee, was to keep during the winter of 1934-35 and care for in such a manner as to enhance the value and condition of said cattle. The "Regional" negligently failed to keep, shelter, feed, water and care for said cattle, resulting in damage to the "petitioner" (R. 1-13 and 25-32). The specific acts of negligence and the items of damage to "petitioner" therefrom are set forth in the petition. The respondents interposed separate demurrers to this complaint (R. 32-33) which set up substantially the following grounds: (1) That the court had no jurisdiction of the respondents or the subject matter, because the respondents were immune from suit without the permission of Congress, and (2) that the petition did not state facts sufficient to constitute a cause of action against respondents or either of them.

The "Regional" was created by the "RFC" pursuant to Section 605B(e) of the Act under which the "RFC" was organized (15 U. S. C. A., Secs. 601-617, C. 520, §201 (e) 47 Stat. 713). This Act authorized the "RFC" to "create" a Regional Agricultural Credit Corporation in each of the twelve Federal Land Bank districts, with a paid up capital of not less than $3,000,000.00 to be subscribed by the "RFC" and paid out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture. The Act provided that the officers and agents should be appointed by the "RFC". This function was later transferred to the Governor of the Farm Credit Administration, pursuant to executive order

No. 6084, dated March 27, 1933, effective on May 27, 1933. The same order transferred to the Governor of the Farm Credit Administration control of the funds allocated by the Act to the Secretary of Agriculture.

The Act in express terms declared that the "RFC" should have capital stock, corporate organization, sue and be sued, a limited duration, and numerous powers and purposes (15 U. S. C. A., Sec. 604, C. 8, §4, 47 Stat. 6). It provided that a Regional Agricultural Credit Corporation shall have capital (not capital stock), corporate organization and power to make loans and advances for agricultural and livestock purposes, charge interest thereon and to rediscount its paper. The Act does not in express terms declare the "Regional" may sue or be sued, nor does it limit its duration.

The District Court sustained the demurrers, expressing the view that the defendants were instrumentalities of the United States and hence were immune from suit in an action sounding in tort, without the permission of Congress (R. 34). The District Court thereupon dismissed the action (R. 35).

On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, that court on July 7, 1938, entered an opinion and judgment in which it held that the petition stated facts sufficient to constitute a cause of action under the Nebraska law against the defendant "Regional" but held that the transfer of the control of the "Regional" by executive order relieved the "RFC" of any liability and that the respondent "Regional" was a governmental agency with immunity from suit and affirmed the dismissal by the District Court (R. 45-51).

STATEMENT OF POINTS TO BE ARGUED

Congressional intent that the "Regional" be subject to suit is expressed by selection of a corporation itself subject to suit (the R. F. C.) to form the "Regional".

Title 15, Section 604, U. S. C. A. Sup.; C. 8, §4, 47 Stat. 6

Title 15, Section 605B (e) U. S. C. A. Sup.; C. 520, § 201 (e), 47 Stat. 713

Casper v. *Regional Agl. Credit Corp.*, 202 Minn. —, 278 N. W. 896

Congressional intent that the "Regional" be subject to suit is expressed by direction that the "Regional" be formed as a corporation.

Casper v. *Regional Agl. Credit Corp.* (Minn.) 278 N. W. 896

Bank of U. S. v. *The Planters Bank of Georgia*, 9 Wheat. (U. S.) 904, 6 L. Ed. 244

Fed. Sugar Refin. Co. v. *U. S. Sugar Eq. Bd.* 268 Fed. 575

Sloan Shipyards Corp. v. *U. S. Shipping Bd.*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762

U. S. Shipping Bd. Em. Fleet Corp. v. *Tabas*, 22 Fed. (2d) 398 (3d C. C. A.)

U. S. Shipping Bd. Em. Fleet Corp. v. *Eichberg*, 14 Fed. (2d) 248, (D. of C. C. C. A.)

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Phillips v. *U. S. Grain Corp.*, 279 Fed. 244

U. S. Grain Corp. v. *Phillips*, 261 U. S. 106, 43 S. Ct. R. 283, 67 L. Ed. 552

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Olson v. *U. S. Spruce Corp.*, 276 U. S. 462, 45 S. Ct. R. 357, 69 L. Ed. 738

United States v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. (2d) 199

Becker Steel Co. v. *Cummings*, 296 U. S. 74, 56 S. Ct. R. 15, 80 L. Ed. 54

Congressional intent that the "Regional" be subject to suit is expressed by nature of business "Regional" was directed to transact.

Title 15, Sec. 605B (e) U. S. C. A. Sup.; C. 520, § 201 (e), 47 Stat. 713

Bank of U. S. v. *Planters Bank of Georgia*, 9 Wheat. (U. S.) 904, 6 L. Ed. 244

U. S. Shipping Bd. Em. Fleet Corp. v. *Harwood*, 281 U. S. 519, 50 S. Ct. R. 372, 74 L. Ed. 1011

Standard Oil Co. v. *U. S.*, 25 Fed. (2d) 480

Hopkins v. *Clemson Agl. College*, 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890

Central Market Inc. v. *King*, 132 Neb. 380, 272 N. W. 244 (cert. refused), 302 U. S. 687, 58 S. Ct. 17, 82 L. Ed. 14

Federal Land Bank v. *Priddy*, 295 U. S. 229, 55 S. Ct. R. 705, 79 L. Ed. 1408

St. of No. Dak. v. *Olson*, 33 Fed. (2d) 848, (8th C. C. A.)

Gross v. *Kentucky Bd. of Mgrs.*, 49 S. W. 458, 105 Ky. 840

Congressional intent that the "Regional" be subject to suit is expressed by inclusion of the word "Corporation" in the name of the respondent "Regional".

3 Thompson on Corporations, 821 (3rd Ed.)

13 American Jurisprudence, 1072, Corporations, Sec. 1155

Dartmouth College v. Woodward, 4 L. Ed. 629, 4 Wheat. (U. S.) 518

Martin v. *Kentucky Lands Inv. Co.*, 142 S. W. 1038 (Ky.)

Barrow S. S. Co. v. *Kane*, 170 U. S. 100, 18 S. Ct. R. 526, 42 L. Ed. 964

14 Corpus Juris, 235, Corporations, Sec. 253

14 Corpus Juris, 235, Corporations, Sec. 254

14 Corpus Juris, 236, Corporations, Sec. 255

Tulare Irrig. Dist. v. *Shepard*, 185 U. S. 1, 22 S. Ct. R. 531, 46 L. Ed. 773

Section 24-221, 1929 Comp. Stat. of Nebr.

Gilligan v. *John Gilligan Co.*, 94 Neb. 437, 143 N. W. 457

Immunity of the sovereign from suit does not extend to agents, no agent being an agent for the purpose of committing a tort.

Hopkins v. *Clemson Agl. College*, 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890

Sloan Shipyards Corp. v. *U. S. Shipping Bd.*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762

McComb v. *U. S. Housing Corp.*, 264 Fed. 589

ASSIGNMENT OF ERRORS

Petitioner's assignment of errors is set forth on page 36 of the transcript of the record. The particular assignments of error to be urged in this brief are:

The court erred in sustaining the demurrer of the respondent "Regional" to petitioner's petition.

The court erred in entering a final judgment of dismissal in favor of the respondents.

This action should be reversed with leave to the petitioner to amend, and for trial on the merits.

ARGUMENT

I. Congressional intent that the "Regional" be subject to suit is expressed by selection of a corporation itself subject to suit (the R. F. C.) to form the "Regional".

The Reconstruction Finance Corporation was expressly authorized to sue and be sued by Congress at the time of its organization.

> "The corporation shall have succession for a period of ten years from the date of the enactment hereof unless it is sooner dissolved by an act of Congress. It shall have power to adopt, alter, and use a corporate seal, which shall be judicially noticed; to make contracts, to lease such real estate as may be necessary for the transaction of its business; *to sue and be sued*, to complain and to defend, in any court of competent jurisdiction, state or federal."
>
> Title 15, Section 604, pp. 98, 99, U. S. C. A. Sup., C. 8, §4, 47 Stat. 6.

The F. R. C. was authorized to form the "Regional".

> "The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal Land Bank districts where it may deem the same to be desirable a Regional Agricultural Credit Corporation with a paid up capital of not less than $3,000,000 to be subscribed by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amount allocated and made available to the Secretary of Agriculture under Section 602 of this Title. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its Board of Directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, packing, or marketing of livestock, charge such rates of interest or discount thereon as in their judgment are fair and equitable, * * *."
>
> Title 15, Section 605B (e) U. S. C. A. Sup. 107, 108, C. 520, §201 (e), 47 Stat. 713.

The Minnesota Supreme Court took this view in the case decided by it:

> "The inference that defendant is subject to suit is supported by the fact that its creator, the Reconstruction Finance Corporation, is itself subject to suit. The theory on which immunity is sustained is that the creator has transmtited to the creature its sovereign immunity. The government withheld such immunity from the Reconstruction Finance Corporation. It thus indicated a general policy of subjecting the Reconstruction Finance Corporation and its property to suit and judicial process. True, defendant derives its powers

> from the statute, but it is hardly to be inferred that immunity would be granted to the creature where it is withheld from the creator. The fact that defendant was created a corporation with all incidents of a corporation would seem to be decisive in the light of other considerations."
>
> *Casper* v. *Regional Agl. Credit Corp.*, 202 Minn. —, 278 N. W. 896.

Congress caused the R.F.C. to create the "Regional". Congress having determined the paternity of the "Regional", will be presumed to have intended that the blood of the father appear in the child. The life blood of the R.F.C. is that of a corporation subject to suit.

Congress expressed itself by saying that a corporation should be organized by a corporation already organized and subject to suit. Congress did not say the corporation so created was to be immune from suit. Thus the "Regional", being a corporation and conceded by its attorneys to be a separate entity has, by necessary, reasonable and fair inference, congressional authority to sue and be sued. The "Regional" has exercised a right to sue by bringing actions in many instances against persons to whom it has made loans. The "Regional" could bring suits without express authority for the same reason it is subject to suit. Such powers are implied from its corporate capacity.

The Congress had no necessity to say the "Regional" was to be subject to suit. Congress had in the past authorized administrative officers and boards to set up corporate agencies and in every instance such agencies had been held subject to suit. Thus the U. S. Shipping Board, an unin-

corporated agency, itself immune from suit, was authorized to create the U. S. Shipping Board Emergency Fleet Corporation, and the corporation was held subject to suit; the U. S. Food Administrator (not subject to suit) created the U. S. Grain Corporation and the corporation was held subject to suit; the same agency organized the Sugar Equalization Board, Inc., and the corporation was held subject to suit; the Isthmian Canal Commission (not subject to suit) created the Panama Railroad Company and the latter was held subject to suit as a corporation; the Farm Board (not subject to suit) created various marketing corporations which were held subject to suit; the Director of Air Craft Production (not subject to suit) organized the U. S. Spruce Corporation and it was held subject to suit.

Congress is presumed to know the law. The law had held corporations formed, owned, operated and directed by unincorporated and immune government agencies subject to suit even though Congress had not expressly waived the corporation's immunity from suit. When Congress then directed the R.F.C., itself subject to suit, to form a corporation, it must have intended to thereby express, by directing its formation as a corporation and directing that it loan money at interest, that such corporation be subject to suit.

The place of incorporation is not a test of the intent of Congress because on this point Congress is silent. The issuance of a charter by the R.F.C. without complying with the incorporation laws of a state or the District of Columbia was an oversight, or a brain-child of the R.F.C., not an expression from Congress. That the mind of the person who formed the "Regional" did not cperate as the persons

who formed the U. S. Sugar Equalization Board, Inc., the Panama Railway, the marketing or stabilization corporations or the U. S. Spruce Corporation did not reflect any congressional intent and is not a sound basis for distinction.

Congress has clearly indicated its intention that the "Regional" be subject to suit by directing it be a corporation, directing the R.F.C. to create it, directing that it engage in business, and giving it the name of a corporation.

II. Congressional intent that the "Regional" be subject to suit is expressed by direction that the "Regional" be formed as a corporation.

The decision of the Supreme Court of Minnesota in a case involving the Regional operating in that state is especially pertinent on this phase:

> "A grant of corporate existence is itself a grant of power to sue and be sued. Those incidents, unless expressly withheld, exist without specific enumeration. 3 Thompson, Corporations, 3d Ed., Sec. 2180, p. 821; 1 Cook, Corporations, 8th Ed. Sec. 3, p. 16; 2 Kent's Commentaries, 13th Ed., 369; 1 Chitty's Blackstone 395, where it is stated that the incidents of a corporation, including the power to sue and be sued, implead and be impleaded, 'are necessarily and inseparably incident to every corporation * * * as soon as a corporation is duly erected * * *'; 6 Viner's Abr. 265 (G), 'When a corporation is duly created, all other incidents are tacitly annexed. As if the king makes a general corporation * * * without any words of license * * * yet the corporation may purchase, plead, or be impleaded well enough; for that by the making of the corporation all those necessary incidents are included'; 8

Halsbury's Laws of England 67, 68; 7 R. C. L. 689, Sec. 690; *Hancock* v. *Louisville Railroad Co.*, 145 U. S. 409, 12 S. Ct. 969, 36 L. Ed. 755; *McLoud* v. *Selby*, 10 Conn. 389, 27 Am. Dec. 689; *De Haas* v. *Pennsylvania R. Co.*, 261 Pa. 499, 104 A. 733; *The Case of Sutton's Hospital*, 5 Coke, Part X, p. 285. This was the settled rule prior to the decision in the case of *Sutton's Hospital* in 1612, supra, in which the court said that the power to sue and be sued is one of the incidents of a corporation and that when a corporation is duly created, the 'incidents are tacitly annexed' including the power to sue and be sued, implead, and be impleaded. The expression used in *Sutton's Case*, that a corporation may sue and be sued, implead, and be impleaded, is still the language of the books. The power of defendant to sue and be sued is implied from the very fact that it is a corporation, the same as though the power had been expressly stated and granted. Such power is a part of defendant's very corporate existence."

Casper v. *R. A. C. C.*, 202 Minn. —, 278 N. W. 896.

The incorporation of an agent has always been conclusive that it was subject to suit when immunity of such an agent was claimed.

"Thus many states of the Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. * * * As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a

party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. *The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation,* and exercises no power or privilege which is not derived from the charter.

"We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts, by the circumstance that the state is a corporator." (Italics ours).

The Bank of the U. S. v. *The Planters' Bank of Georgia,* 9 Wheat. 904, 6 L. Ed. 244.

The District Court of New York, after quoting the Planters' Bank case, supra, went on to say as to the United States Sugar Equalization Board, Inc.:

"Here the case, if anything, is not so strong. The United States is not an incorporator, but a stockholder in a corporation, which, as a *condition or necessary accompaniment of its existence, can be sued and can engage in business.* In enacting the statutes, supra, Congress intended, inter alia, to conserve necessaries during the war, and therefore, conferring large and almost unlimited powers to select agencies to that end, it is fair to assume that the Congress realized that it might be necessary to engage in commercial transactions. The very incorporation of defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate, and doubtless subject to embarrassment by a maze of unworkable statutes and regulations, and that the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business corpora-

tions. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign.

"There is not even in this case the creation of a corporation by act of Congress nor an express direction to incorporate, such as is found in the Shipping Act (Comp. St. Secs. 8146a-8146r). Gould Coupler Co. Case, supra. But here the Executive, in pursuance of the discretion vested in him, *chose an agent which by its very nature and existence* had the right to engage in a commercial business. *The whole tendency is against the extension of the immunity of the sovereign* as against proper suitors, as is evidenced by such legislation as the Tucker Act (24 Stat. 505) and the Shipping Act (construed in certain respects in The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962), and by cases such as are cited supra. This is not a case which invites a step in the opposite direction." (Italics ours).

Federal Sugar Refin. Co. v. United States S. E. Board, 268 F. 575, 586.

And the same reason was assigned for holding the United States Shipping Board Emergency Fleet Corporation subject to suit.

"The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, what-

ever indemnities might be furnished by the United States."

Sloan Shipyards Corp. v. *United States Shipping Board*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762.

Chief Justice Taft in dissenting from the majority opinion which held the United States Shipping Board Emergency Fleet Corporation subject to suit, used strong language as to the effect of an incorporation.

"I concede that the legislation originally creating this corporation, without express immunity from suit, naturally gives rise to the inference that Congress concluded that the greater freedom of action secured by carrying on business in corporate form was desirable and that in the absence of express provision for it, and in respect to what the corporation was originally intended to do, immunity cannot be reasonably implied from the relation of the government to the corporation and its interest in its business." (Italics ours).

Sloan Shipyards Corp. v. *United States Shipping Board*, supra.

"The meaning of incorporation is that the corporate entity is a person and as such is subject to the general rules of law. While the United States owns all the stock of the defendant corporation, it is controlled and managed by its own officers, who are responsible directly to it, and must be regarded as a separate entity, which may enter into contracts and sue and be sued." (Italics ours).

United States Shipping Board Emergency Fleet Corp. v. *Tabas*, 22 F. (2d) 398 (3d C. C. A.).

"The Shipping Board, in the present case, in answer to plaintiff's petition, by way of defense, set up

the authority vested in it by the President, and alleged that it was acting solely as the agent of the United States, and not on its own behalf as a private corporation. To this the plaintiff demurred, and moved to strike out this defense on the ground that it is immaterial, irrelevant, and constitutes no defense to the present action. The motion was properly sustained, since the action here is against the Shipping Board, *acting in the capacity of a private corporation.* In this it differs from the Russell Motor Case, where the action was clearly one against the United States, since the contract was made by the Secretary of the Navy, *acting, not in a corporate capacity,* but on behalf of the government, the only way in which he could act. *This,* in brief, we think, *is the distinguishing feature* which obviates the necessity of plaintiff invoking the jurisdiction of the Court of Claims." (Italics ours).

United States Shipping Board Emergency Fleet Corp. v. *Eichberg,* 14 F. (2d) 248 (District of Columbia C. C. A.).

An examination of some of the other corporations formed by Congress for the purpose of carrying on different commercial enterprises for the government, and the fact that they have consistently been held to be liable to suit, afford authority for a decision to like effect in this action.

"*Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations;* it does not enjoy the priority of the United States in bankruptcy proceedings (*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762), and its employees are not agents of the United States, subject to the provisions of section 41 of the Criminal Code, being 18 U. S. C. A.

Sec. 93 (*United States* v. *Strang*, 254 U. S. 491, 41 S. Ct. R. 165, 65 L. Ed. 369). Compare 34 Op. Attys. Gen. 241.

"Government-owned private corporations were employed by the United States as its instrumentalities in several other fields during the World War. The Food Administration Grain Corporation (later called the United States Grain Corporation) was organized under the laws of Delaware under Food Control Act Aug. 10, 1917, c. 53, Sec. 19, 40 Stat. 276 (Comp. St. Sec. 3115 1/8n). See Act March 4, 1919, c. 125, 40 Stat. 1348, and Executive Orders of August 14, 1917, and March 4, 1919. The United States Spruce Corporation was organized by the Director of Air Craft Production under the laws of the District of Columbia, pursuant to Act July 9, 1918, c. 143, 40 Stat. 845, 888, 889 (Comp. St. Secs. 3115 1/32 g-3115 1/32k), for the purpose of aiding in the production of aircraft material. The United States Housing Corporation was organized under the laws of the District of Columbia by authority of the President, for the purpose of providing housing for war needs under Act June 4, 1918, c. 92, 40 Stat. 594, 595 (3115 5/6g, 3115 5/6gg, 3115 5/6i). The War Finance Corporation was organized under Act April 5, 1918, c. 45, 40 Stat. 506 (15 USCA Sec. 331 et seq. (Comp. St. Secs. 3115 4/5a—3115 4/5qq)), to assist financially industries important to the successful prosecution of the War. For many years before the War, the government had employed the Panama Railroad Company as its instrumentality in connection with the Canal. And, since the War, the Inland Waterways Corporation has been organized by the Secretary of War to operate the government-owned inland waterways system pursuant to Act June 3, 1924, c. 243, 43 Stat. 360 (49 USCA Secs. 151-156 (Comp. St. Secs. 10071½ -10071½e)). The government likewise has established, and holds all the stock in, the Federal Inter-

mediate Credit Banks, formed under Act March 4, 1923, c. 252, title 1, Sec. 205, 42 Stat. 1454, 1457 (12 USCA Sec. 1061), to bring about easier agricultural credits." (Italics ours).

United States v. *McCarl*, 275 U. S. 1, 48 S. Ct. R. 12, 71 L. Ed. 131.

In deciding the case of *North Dakota-Montana Wheat Growers Assn.* v. *U. S.*, 66 Fed. (2d) 573, 92 A. L. R. 1484, the Eighth Circuit Court of Appeals held that an action brought against the Farm Board was analogous to bringing one against the United States Shipping Board, both of which are unincorporated agencies and that the plaintiff erred in not bringing the action against the corporation organized by the Farm Board which would be analogous to the Shipping Board Emergency Fleet Corporation, or to the Regional Agricultural Credit Corporation in this action as distinguished from the Farm Credit Administration or R.F.C. The court in ruling on this matter said:

"It evidently had recognized the stabilization corporations which dealt with defendant in relation to the wheat. These corporations acting as marketing agencies for their stockholders or members and for the purpose of controlling any surplus in a commodity in furtherance of the general policy of the Agricultural Marketing Act. *They were distinct entities, duly incorporated, and undoubtedly entitled to sue and to be sued as other corporations.* It is entirely different, we think, as to the Farm Board. It has no identity separate and distinct from the government—it is merely an unincorporated agency of the government to carry out the purposes of the Agricultural Marketing Act. The government has created at various times corporations for certain purposes and to act as instrumentalities in furtherance of governmental purposes,

and provided as to some of them that they may sue and be sued. Such provisions exist as to Federal Reserve Banks, section 341, chapter 3, title 12 USCA; Federal Land Bank, section 676, chapter 7, title 12 USCA; Federal Intermediate Credit Banks, section 1023, chapter 8, title 12 USCA; Reconstruction Finance Corporation, section 604, chapter 14, title 15 USCA." (Italics ours).

The United States Food Administrator (an unincorporated governmental agency not subject to suit) created the United States Grain Corporation. The distinction as to immunity of the organizing agency and the corporation was examined and the corporation held subject to suit.

Phillips v. *U. S. Grain Corp.*, 279 Fed. 244; *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106, 43 S. Ct. R. 283, 67 L. Ed. 552.

The United States Food Administrator also formed the United States Sugar Equalization Board, Incorporated. The distinction between a governmental board and a corporation was recognized and the corporation held subject to suit.

Federal Sugar Refining Co. v. *U. S. Sugar Equalization Board, Inc.*, 268 Fed. 575.

The Isthmian Canal Commission (an unincorporated governmental agency, not subject to suit) operated through the Panama Railroad Company, a corporation. The distinction has been repeatedly recognized and the corporation held subject to suit.

Salas v. *United States*, 234 Fed. 842 (C.C.A. 2); *Panama R. Co.* v. *Curran*, 256 Fed. 768; *Panama R. Co.* v. *Minnix*, 282 Fed. 47.

The Farm Board (an unincorporated governmental agency, held not subject to suit) formed various marketing corporations and the 8th Circuit Court held those marketing corporations "were distinct entities, duly incorporated, and undoubtedly entitled to sue and be sued as other corporations."

> *North Dakota-Montana Wheat Growers Assn.* v. *United States*, 66 Fed. (2d) 573, 92 A.L.R. 1484.

Similar distinctions have been recognized as to the Director of Air Craft Production organizing the United States Spruce Corporation, and the Secretary of War organizing the Inland Waterway Corporation.

> See *Olson* v. *U. S. Spruce Corp.*, 276 U. S. 462, 45 S. Ct. R. 357, 69 L. Ed. 738.

In the seven examples just mentioned, the corporations were formed, created and used by an administrative agency without any congressional expression as to whether such corporations should be subject to, or immune from suits. In each instance the corporation was held subject to suit because of its incorporation and despite the immunity from suit of the body or person organizing such corporations.

In the case of the Regionals there is a similar congressional silence as to the corporations being subject to, or immune from, suit. But Congress required that a corporation be formed and further directed creation of the corporation by the R.F.C., itself an incorporated body and subject to suit.

The distinction existing between these seven corporations and the Regional, so far as any congressional expres-

sion as to suability is concerned, conclusively shows a stronger case as to the Regional being subject to suit than any of the other seven corporations. Yet the Circuit Court of Appeals held that Congress intended all seven of these corporations to be subject to suit and the Regional corporation exempt from suit. We respectfully submit that the opinion of the Minnesota Supreme Court is correct and that the decision of the Circuit Court of Appeals is based upon a distinction which is actually nonexistent.

The rule hereinbefore set forth in regard to the suability of corporations organized by our government has been applied to corporations organized by foreign governments.

> "The person and property of a foreign sovereign and those who represent him are inviolable, whether their acts are commercial, tortious, or criminal, and no matter where performed, but no one else enjoys such immunity (Syl. 1).
>
> "A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government and is sued as a governmental agent and its stock is owned solely by government" (Syl. 2).
>
> *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. (2d) 199.

The plaintiff in this action being a citizen of the United States, is equally entitled to the protection of the Fifth Amendment as was the alien whose rights were involved in the cited case.

> *"Only compelling language in congressional enactments will be construed as withdrawing or cur-*

tailing the privilege of suit against the United States Government in recognition of obligation imposed by constitution." (Italics ours).

Becker Steel Co. v. *Cummings*, 296 U. S. 74, 56 S. Ct. R. 15, 80 L. Ed. 54.

III. Congressional intent that the "Regional" be subject to suit is expressed by nature of business "Regional" was directed to transact.

The Congressional enactment authorizing creation of the Regional provided that it was "authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, packing, or marketing of livestock, charge such rates of interest or discount thereon as in their judgment are fair and equitable." (See Title 15, Section 605B, (e) U.S.C.A. Sup., C. 520, §201 (e), 47 Stat. 713.

The "Regional", respondent herein, is, by its charter "hereby authorized and empowered to do and perform all acts and transact all business which by implication or otherwise is permitted legally to be done, performed and transacted * * * and to do all other things incidental thereto and necessary or appropriate in connection therewith * * *" (P. 11, Record).

"It is, we think, a sound principle, that when a *government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character,* and takes that of a private citizen. Instead of com-

municating to the company its privilege and its prerogatives, it descends to a level with those with whom it associates itself, and *takes the character which belongs to its associates*, and *to the business which is to be transacted.* (Italics ours).

The Bank of the U. S. v. *The Planters' Bank of Georgia*, 9 *Wheat.* (U. S.) 904, 6 L. Ed. 244.

We have previously emphasized, and again repeat our belief, that the instant case is similar in principle to the Shipping Board cases.

"The only question now presented is whether the quasi-public character of the Fleet Corporation and the duties imposed upon it as an agency of the United States by Acts of Congress and Executive Orders, described and considered in earlier opinions of this court, require a different conclusion with respect to its contracts.

* * *

"In the present case the agent is not an individual and its liability does not involve any expenditure of private funds for the satisfaction of public obligations. Its entire capital stock is government owned. Its funds and property were furnished to it by the government. They and government indemnity are alone the sources from which its obligations will be defrayed.

"It was created as a government agency to construct a fleet of vessels to meet a wartime emergency. It was in order better to fulfill that purpose that Congress chose an instrument having the power to contract as well as all the other powers of a private corporation, but with its every action government controlled and all its assets supplied from government sources. The advantages of resorting to such powers

in meeting the national emergency were urged as grounds for the choice of this particular form of agency, when the Urgent Deficiency Bill was pending in Congress. * * * There is thus no basis for presuming that the Fleet Corporation is not to be deemed bound by the contracts into which it enters merely because it is acting as such an agency."

United States Shipping Board, etc. v. *Harwood,* 381 U. S. 519, 50 S. Ct. R. 372, 373, 74 L. Ed. 1011.

"Where the state creates a commission or other agency and authorizes it to conduct ordinary business ventures, it is immaterial whether the state expressly provides that it may be sued, for such liability arises from the business it is authorized to conduct.

"This is what I understand to be the holding in *Bank of U. S.* v. *Planters' Bank of Ga.,* 9 Wheat. 904, 6 L. Ed. 244.

"This is not a suit against the state, but one against the commission created by the state. When the state made a common carrier, a warehouseman, a cotton compressor, an operator of a grain elevator, a wharfinger and an employer and furnisher of pilots for pay, of the Docks Commission, it necessarily subjected it to the same rules as to suit that other persons and corporations engaged in those various occupations were subject to."

Standard Oil Co. v. *United States,* 25 F. (2d) 480.

"Again, and still treating the question as though involved in the plea to the jurisdiction, that is *not an action* against the college *for a tort committed in the prosecution of any governmental function.* The fee was in the state, but the corporation as equitable owner, was in the possession, use, and enjoyment of the property. For protecting the bottom land, the college, *for its own corporate purposes and advantages,*

constructed the dyke. In so doing it was not acting in any governmental capacity. *The embankment was in law similar to one which might have been built for private purposes by the plaintiff* on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued and held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him if, for its own benefit, and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. 2 Dill. Mun. Corp., 4th ed. Sec. 966, p. 1180." (Italics ours).

Hopkins v. *Clemson Agl. College,* 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890.

It is interesting to note that governmental loan agencies have been held subject to process not provided for in the acts creating them.

"The Home Owners Loan Corporation does not have the powers of either the executive, judicial, or legislative branches of government. It was granted no immunity from civil process. It provides emergency relief to home owners to refinance mortgages, and is subject to the same liabilities as other corporations similarly employed" (Syl. 3).

Central Market, Inc. v. *King,* 132 Neb. 380, 272 N. W. 244, certiorari refused in *Home Owners Loan Corp.* v. *Central Market, Inc.,* 302 U. S. 687, 58 S. Ct. R. 17, 82 L. Ed. 14.

And as to the Federal Land Bank, the court held it was subject to the garnishment and also held:

"Immunity of corporate government agencies from suit and judicial process and their incidentals is less readily implied than immunity from taxation."

Federal Land Bank v. *Priddy*, 295 U. S. 229, 55 S. Ct. R. 705, 79 L. Ed. 1408.

The following is the rule in regard to a state organized corporation:

"When a state creates a corporation for purpose of engaging in private business and acquires part or whole of the capital thereof, it divests itself of its sovereign character as respects such corporation's transactions and cannot claim privileges or immunities of the sovereign as to them" (Syl. 2).

State of North Dakota v. *Olson*, 33 F. (2d) 848 (8 C. C. A.).

From the fact that a state agency was given power to contract and the state was not subject to the indebtedness of this agent, the Kentucky court held that the state had thereby expressed the intention that the Board be treated as a corporation and subject to suit without further expression of the legislature and even though the name of the Board did not indicate a corporation as it does in the pending case.

"The rule is well settled that the state cannot be sued, and that the same protection is extended to the officers of the state. *But this rule does not apply to a corporation* created by the state for certain public purposes. If appellee was made by the acts referred to, a corporation or a quasi corporation, we see no reason why it should be exempted from the rule allowing suits to be brought against corporations on contracts they have made. So the question is presented whether appellee was invested by the legislature with the character of a corporation or quasi corporation.

It is not necessary that the thing created by the legislature should be named by it a corporation. *Its character depends upon the powers given it, and not upon the name by which the legislature may call it.* * * * * it cannot be presumed that it was contemplated that people who dealt with this board should have no one to look to for the enforcement of their just claims. The board was authorized to have a house built, and a restaurant run in it, to employ agents and assistants, and to take all necessary steps to have the state properly represented at that exposition. The commissioners clearly were not personally responsible for their obligations, the state expressly declared that it was not to be responsible, and the only reasonable conclusion is that the board of managers, to whom the $100,000 was committed to carry out the objects of the act, was intended to be, to the extent of the funds put in its hands, at least a quasi corporation; and, as the power to make contracts is expressly conferred, *the power to sue or be sued on these contracts was necessarily vested in the board, for the contracts were the obligations of the board, and not the obligations of the state.* It is true that this board has been called, in an opinion by this court, an 'agency of the state.' It was an agency of the state, but it was *also vested with corporate powers*, and in its corporate capacity it may be sued for its corporate acts, just as any other corporation." (Italics ours.)

Gross v. *Kentucky Board of Managers*, 49 S. W. 458, 105 Ky. 840.

IV. Congressional intent that the "Regional" be subject to suit is expressed by inclusion of word "Corporation" in the name of the respondent "Regional".

Congress did not intend and will not be presumed to have intended to defraud the "petitioner" and others. Yet to

hold that the respondent "Regional" is not subject to suit would be in effect finding Congress intended to commit a fraud on all persons dealing with the "Regional." The full name of the respondent "Regional" is the "Regional Agricultural Credit *Corporation* of Sioux City, Iowa." This name imports a legal entity. No notice is given of any limitation or immunity of the corporation. Such a legal entity dealing in ordinary commercial enterprises, making loans, charging interest and operating a ranch to winter livestock for a stated charge does not give warning it is to claim a sovereign's immunity from suit nor its intention to avoid its responsibility as a commercial corporation. The respondent Regional, obtained "petitioner's" cattle by executing a contract as a corporation.

"The early text-writers and some of the older cases enumerated at least five powers as necessarily incident to every corporation: (a) Perpetual succession, by which is meant the power of admitting members in place of those removed by death or by the transfer of shares, and the continuation as a legal entity notwithstanding such change of membership; (b) to sue and be sued, implead and be impleaded, grant and receive by its corporate name; (c) to purchase, hold and convey real and personal property; (d) to have a common seal and change the same at pleasure; (e) to make by-laws. To these may be added another power incident to certain classes of corporations, that of removing members. Furthermore, the want of an express enumeration of powers does not exclude such incidental powers as are reasonably necessary to accomplish the corporate purpose."

3 Thompson on Corporations, 821 (3d Ed.)

"A corporation may be sued although not expressly made subject to suit by the terms of its charter, not-

withstanding the state is a stockholder or the proprietor of the corporation, because the exemption of a state from suit without its consent does not exempt such a corporation from being sued. Generally speaking, a corporation may be sued in all things touching its corporate duties. Corporate existence implies amenability to legal process."

13 American Jurisprudence 1072, Corporations, Sec. 1155.

In the case of *The Trustees of Dartmouth College* v. *Woodward*, 4 L. Ed. 629, 4 Wheat. 518 (U. S.), Judge Washington in his opinion stated:

"A corporation is defined by Mr. Justice Blackstone to be a franchise. 'It is', says he, 'a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchase, or freedom.' This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. * * *

"The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and making of by-laws."

In the same case, in an opinion written by Judge Story, it is stated:

"An aggregate corporation at common law is a collection of individuals united into one collective body,

under a special name and possessing certain immunities, privileges, and capacities in its collective character which do not belong to the natural persons composing it. Among other things it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties."

Being a corporation, the capacity to sue is presumed until contrary appears.

"And being a corporation, and the power to sue and be sued being both by statute and the principles of the common law an inseparable incident to corporate existence, the legal capacity to sue will be presumed until the contrary appear. Thompson on Corporations, Sec. 3125."

Martin v. *Kentucky Lands Inv. Co.*, 142 S. W. 1038 (Ky.)

Liability of a foreign corporation to be sued need not be expressed. The power to sue and be sued is an incidental power to doing business.

"The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.

"Accordingly, in *Railroad Co.* v. *Harris*, 12 Wall. 65, the Baltimore & Ohio Railroad Company, a corporation chartered by the state of Maryland, and authorized by the statutes of the state of Virginia to extend its railroad into that state, and also by the Act of Congress of March 2, 1831, c. 85 (4 Stat. 476), to extend, construct, and use a lateral branch of its rail-

road into and within the District of Columbia, and to exercise the same powers, rights, and privileges, and be subject to the same restrictions in regard thereto, as provided in its charter, was held, by reason of the Act of Congress, and of service upon its president in the District of Columbia, to be liable to an action in the District by a passenger for an injury happening in the state of Virginia, although the railroad company was a corporation of the state of Maryland only, and neither the Act of Congress authorizing it to construct and use a branch railroad in the District of Columbia, nor any other Act of Congress, had made any provision for bringing suits against foreign corporations."

Barrow S. S. Co. v. *Kane*, 170 U. S. 100, 18 S. Ct. R. 526, 42 L. Ed. 964

Under various comparable situations, persons doing business under a name implying a corporation, have been held to be estopped to deny its corporate capacity and responsibility.

"An estoppel to deny corporate existence may arise, not only from dealing with or from other recognition of a corporation, as shown in the preceding sections, but also from the holding out of an association as a corporporation or participation therein, and such an estoppel may operate either against the association or pretended corporation, or against the individual promoters, stockholders, or members, or persons who have acted as directors, officers, or agents of the pretended corporation, and thus participated in holding it out as a legal corporation."

14 Corpus Juris 235, Corporations, Sec. 253

"The rule of estoppel works both ways; and it is the well settled rule, in some jurisdictions expressly de-

clared by statute, that if an association of persons undertakes to do business in a name which necessarily implies a corporate body, or otherwise holds itself out and acts as a corporation, and executes a note or enters into any other contract as a corporation, or otherwise deals as such, the members are estopped, collectively and individually, to deny its corporate capacity in any action or proceeding arising out of or involving such contract or dealing."

14 Corpus Juris 235, Corporations, Sec. 254

"It has also been held in effect that persons who hold themselves out and do business as a corporation and commit a tort in the course of such business cannot set up want of legal incorporation to escape liability therefor in an action against them as a corporation."

14 C. J. 236, Corporations, Sec. 255

So this court has held public corporations liable on the basis of estoppel where indebtedness was incurred by a corporation not properly organized.

"The rule as stated by Cooley is as follows:

" 'In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such . . . . And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, *proof that the corporation was acting as such, under legislative action,* would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. *And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition.*'

"It was held in *Shapleigh* v. *San Angelo*, 167 U. S. 646, 42 L. Ed. 310, 17 Sup. Ct. Rep. 957, supra, that none but the state could impeach the validity of the creation of a municipal organization, and that if it acquiesced therein the corporate existence could not be collaterally attacked. The court, through Mr. Justice Shiras, said:

" 'The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void ab initio, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the state acting by direct proceedings. Such an organization is merely voidable, *and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor.*' " (Italics ours).

Tulare Irrig. District v. *Shepard*, 185 U. S. 1, 22 S. Ct. R. 531, 46 L. Ed. 773

The rule is statutory in Nebraska:

"No body of men acting as a corporation under the provisions of this article, shall be permitted to set up the want of legal organization as a defense to any action brought against them as a corporation."

Sec. 24-221, Compiled Statutes of Nebr. for 1929

"In *Livingston Loan & Building Ass'n.* v. *Drummond*, 49 Neb. 200, 68 N. W. 375, it was held that a defendant sued as a corporation cannot deny its existence either

in abatement or in bar. If defendant is not a corporation, it cannot appear as such and plead in that capacity. Even if the state were able to question the legal existence of the corporation upon sufficient ground, the defendant could not avail itself of the lack of legal existence and thus commit a sort of legal harakiri in a collateral action of this nature."

Gilligan v. *John Gilligan Co.*, 94 Neb. 437, 143 N. W. 457

V. Immunity of the sovereign from suit does not extend to agents, no agent being an agent for the purpose of committing a tort.

In deciding that Clemson College of South Carolina might be sued and that it did not partake of the state's immunity, Judge Lamar, in an early case, said:

"That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law.

"*But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts.* The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit

penalties upon individual offenders * * * whenever they interpose the shield of the state? * * * The whole frame and scheme of the political institutions of this country, state and Federal protest' against extending to any agent the sovereign's exemption from legal process. *Poindexter* v. *Greenhow*, 114 U. S. 270, 291, 5 S. Ct. R. 903, 962, 29 L. Ed. 185, 193.

* * *

"Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application,—the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury." (Italics ours.)

Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 31 S. Ct. R. 654, 55 L. Ed. 890.

This rule is especially applicable where the agent of the government is so far removed from a governmental function as to be appointed in the form of a corporation.

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if any one would

contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of Government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 842, 843, 6 L. Ed. 204; *United States* v. *Lee*, 106 U. S. 196, 213, 221, 1 S. Ct. R. 240, 27 L. Ed. 171. * * *

"If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law. * * * But the taking possession of the plaintiffs' plants on December 1, 1917, is alleged to have been unlawful and it cannot be assumed at this stage that the act of the Fleet Corporation was in pursuance of any powers then delegated to it or was within the ratification of December 3, 1918. The plaintiffs *are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act.* In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name." (Italics ours.)

Sloan Shipyards Corp. v. *United States Shipping Board*, 258 U. S. 549, 42 S. Ct. R. 386, 66 L. Ed. 762.

The following was said in regard to the United States Housing Corporation:

"The case of *United States* v. *Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, after a most profound and exhaustive consideration of the question and for basic reasons, decides that in some instances at least suits

may be maintained against individuals, without the consent of the United States, although 'the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government.' It will be noted that in the case just mentioned the question was raised by the government itself, and not by the individual defendants, as was done in the present case. *It is likewise a general rule that when officers of the government act* under invalid authority, or *exceed or abuse their lawful authority, and thereby invade private rights* secured by the Constitution, *an action to redress injuries caused by the unauthorized act is not a suit against the state.* * * * whether the defendants exceeded their authority must depend, as I now see it, upon the acts of the defendants when viewed in the lights of the statute, the orders of the President, and the charter of the defendant corporation. The charter is not now before me. Aside from mere procedure, a due regard for the powers of the government, coupled with proper care lest in the protection of such powers the liberties of the individual, intended to be preserved by the Bill of Rights, be encroached upon or destroyed to the jeopardy, not of individuals alone, but of the government as well, would seem to require that the questions presented under the third and fourth propositions of the defendants be not decided upon a mere preliminary motion, but that consideration thereof be deferred until all material facts are before the court." (Italics ours.)

McComb v. *United States Housing Corp.*, 264 F. 589 (592).

CONCLUSION

Every expression of Congress indicates the "Regional" to be subject to suit. The "Regional" has claimed

the correlated implied power to sue by repeatedly going into court in its own name to bring suit. It has engaged in business enterprises and in every way held itself out as a corporate entity having full powers of an ordinary commercial corporation.

The "Regional" was created as a corporation for the purpose of obtaining private funds which it could in turn lend and obtain a profit on through interest charges. The Congressional debates disclose this through the words of Mr. Steiwer, Senator from Oregon, who introduced and sponsored the amendment to the R. F. C. bill providing for the "Regional". As shown by the Congressional Record for January 21, 1932, he said: "Mr. President, the purpose of setting up the Corporations in the different land bank districts was to create an entity which under the law would be authorized to rediscount with the Federal Intermediate Credit Banks. The R. F. C. could hardly do that if it were merely to appoint agents in different places or appoint an agent in each of the Federal Land Bank districts. A separate entity will be permitted under the existing law, to take notes and rediscount them and thus have a source of money which is not government money at all."

Of course the "Intermediate Banks are capitalized by the United States but they sell their debentures and this amendment will give the farmers an opportunity to secure credit which is derived from private sources."

Thus we see that the "Regional's" funds are not entirely government money. The money loaned petitioners may have been private money. It would be manifestly un-

fair for this court to assume that such a corporation cannot be sued by the private persons from whom it borrows money. It is likewise unfair for it to commit a tort against petitioner and for petitioner to be denied a remedy. In the face of the congressional intent, as shown herein, we submit that the rulings of the court below were erroneous and should be reversed and this case remanded to the district court for such amendments in the pleadings as are necessary and for a trial on the merits.

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